Office-Supreme Court, U.S.
FILED
AUG 25 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 7

JOHN JOSEPH KILLIAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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OPINIONS BELOW.

The opinion of the court below is reported at 275 F. 2d 561. The opinion of the court below reversing petitioner's first conviction is reported at 246 F. 2d 77.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 11, 1960. Petition for rehearing was denied on April 13, 1960. On May 4, 1960, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including June 12, 1960. The petition for a writ of certiorari was granted May 1, 1961. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether it is within the discretion of a trial judge to excuse the production of statements after a complete foundation for their production is laid under 18 U. S. C., Section 3500, when it is known that these statements contain receipts of payment to the prosecution witnesses as *delators* and informers but it is not known how detailed the receipts are or what other statements of the witnesses they contain, and all the prosecution has offered to produce in the stead of these statements is a list of the dates and amounts of payment.

2. Whether the trial court's instruction on the issue of membership

   (a) Improperly defined membership in the Communist Party.

   (b) Was correct in equating membership in the Communist Party and affiliation with that Party.

   (c) Applied the statute in such a way that it provided no ascertainable standard of guilt and abridged First Amendment liberties.

3. Whether the trial court's instruction on the issue of affiliation

   (a) Was incorrect in failing to define affiliation as membership in an organization affiliated to the Communist Party.

   (b) Permitted the jury to return a verdict of guilty on the second count because of activities protected by the First Amendment.

   (c) Applied the statute in such a way that it deprived defendant of Due Process of Law.

4. Assuming that the definition of the statutory term "affiliated with" in 29 U. S. C., Section 159(h) follows the

opinion of this Court in *Bridges* v. *Wixon*, 326 U. S. 135, whether the trial court followed that ruling in defining the phrase to the jury.

STATUTES INVOLVED.

The relevant provisions of the statutes involved, 18 U. S. C., Section 1001, the "false statements" act, 29 U. S. C. 195(h) and 18 U. S. C., Section 3500 are set forth in the Appendix, *infra*, pp. 35, 36, 37.

STATEMENT OF THE CASE.

Petitioner was indicted under 18 U. S. C., Section 1001. The indictment charged in two counts that petitioner had on December 11, 1952 filed with the National Labor Relations Board a false "affidavit of Non-Communist Union Officer" (the oath required by Section 9(h) of the Taft-Hartley Act). The allegedly false statements were that petitioner was not a member of Communist Party (Count I), or affiliated with that Party (Count II).

Petitioner's first conviction was reversed upon appeal to the Court of Appeals for the Seventh Circuit, *United States* v. *Killian* (7th Cir., 1957), 246 F. 2d 77, because the trial court had not followed the procedure for the production of documents approved in this court in *Jencks* v. *United States*, 353 U. S. 657. He was retried, convicted on each count and sentenced to a five year term of imprisonment on the first count and a three year term on the second count, the sentences to be served concurrently. The conviction was upheld by the Court of Appeals, *United States* v. *Killian* (7 Cir., 1960), 275 F. 2d 561. This Court granted a limited writ of certiorari which does not permit a discussion here of the sufficiency of the evidence.

The prosecution's case at trial rested primarily upon the testimony of a single witness, Ondrejka, who had been a

paid informer for the Federal Bureau of Investigation and who testified that he had met petitioner as a Communist at widely separated times in the period 1951-1953. The prosecution also produced testimony from two other witnesses, Fensholt and Sullivan (the latter being also a paid informer for the Federal Bureau of Investigation), who testified that petitioner was a Communist while a student at the University of Wisconsin in 1949 and 1950.

The trial and verdict thus turned primarily upon the jury's belief in the credibility of Ondrejka (and secondarily upon that of Sullivan and Fensholt). Defense counsel, after the direct testimony of Sullivan and Ondrejka, moved under 18 U. S. C. Section 3500 that they be furnished with the witnesses' previous statements relating to the subject matter of their direct testimony (tr. 330, 455-458).[1] Subsequently, in the course of cross-examination it was developed that, in addition to the statements furnished by the prosecution, the witnesses had given periodic statements to agents of the Federal Bureau of Investigation which detailed at least the amounts of their expenses and disbursements for which they were reimbursed (tr. 373, 505). What other information was in these statements was not disclosed by the testimony. Sullivan had signed his statements (tr. 373); Ondrejka had reported his expenditures orally to the agent who had written them down as they were reported (tr. 506). The trial court foreclosed inquiry as to whether or not Ondrejka had signed his statements (tr. 506-509).

After the close of Ondrejka's testimony the defense moved specifically for the production of the statements in question (tr. 547-548).[2] The United States Attorney opposed

1. References preceded by "tr." are to the typewritten transcript of trial proceedings.

2. Cross-examination had raised a serious question concerning Ondrejka's character.

this motion and offered to provide, instead of the original documents, a schedule containing dates of payment and the amounts. This offer was refused by the defense and the trial judge denied the motion.

The trial court's instructions on membership and affiliation are set forth in the appendix, pp. 36-38, *infra*.

SUMMARY OF ARGUMENT.

1. Under the statute the trial judge had no discretion to refuse to order the production of all the "statements" of the witnesses Ondrejka and Sullivan including those in question here. They were squarely within the command of 18 U. S. C., Section 3500, that the trial judge on motion of the defendant "shall order the United States to produce any statement * * * of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." The statute on its face gives the trial judge no discretion; if the trial judge had any discretion under the statute, he could not exercise it understandingly here since he had not seen the documents and could not appraise their value to the defense. Under the circumstances of this case the defendant was deprived of meaningful use of the right of confrontation protected by the Sixth Amendment.

2. The instruction on membership like the instruction on affiliation completely confused the statuses of membership and affiliation which the statute and the authorities make separate and distinct. It defined membership solely in terms of a state of mind without objective criteria, thereby departing from the gloss placed upon the statute by this Court in *American Communications Association* v. *Donds*, 339 U. S. 382, and violating the command of the First Amendment. (Even in defining membership subjectively the instruction was deficient in failing to require that defendant believe himself to be a member.) The purely subjective definition of membership left the jurors free to attach guilt on the basis of their own prejudices. This error was emphasized by the "indicia" of member-

ship given the jurors by the Court. These "indicia," based on the doctrine of parallelism, permitted the jury to rest guilt upon acts protected by the First Amendment and made the statute an engine for the destruction of the rights which that Amendment guarantees.

3. The proper definition of the term "affiliated with" as it occurs in Section 9(h) of the Taft-Hartley Act is membership in an organization which is organizationally linked with the Communist Party. The trial court erred in failing so to instruct the jury. Instead it defined affiliation solely in terms of a subjective state of mind without defined objective factual criteria, thereby permitting invasion by the state of an area which the First Amendment puts beyond the competence of the state. The definition given the jury was so vague, tenuous and uncertain, that the statute as applied did not meet the requirements of certainty in criminal statutes prescribed by the Fifth Amendment and permitted the jury to premise guilt upon the exercise of rights whose innocence is guaranteed by the First Amendment. The instruction given was confusing, since it contained three separate and disparate definitions of affiliation and equated the statuses of membership and affiliation which the statute and authorities declare to be separate and distinct. Assuming, *arguendo*, that the definition of "affiliated with" in this case is controlled by this Court's decision in *Bridges* v. *Wixon*, 326 U. S. 135, the instruction was deficient in failing to instruct the jury that the affiliation must include a working alliance to accomplish the proscribed purposes of the Communist Party—in the case of Section 9(h) the political strike.

ARGUMENT.

POINT I. THE TRIAL COURT'S REFUSAL TO ORDER THE PRODUCTION OF THE WITHHELD STATEMENTS OF THE WITNESSES ONDREJKA AND SULLIVAN WAS CONTRARY TO THE MANDATE OF 18 U. S. C. SECTION 3500.

The statements of the prosecution witnesses, Ondrejka and Sullivan which included a statement of the moneys received by them, and their disbursements were "statements" within the meaning of 18 U. S. C. Section 3500 (e). Sullivan signed his statements. Ondrejka reported his expenditures orally to an agent of the Federal Bureau of Investigation who wrote them down. (The trial court forbade inquiry into whether or not Ondrejka had signed these statements.) Sullivan's statements were therefore "a written statement made by said witness and signed or otherwise adopted by him" (Section 3500(e)(1)). *Prima facie*, Ondrejka's statements fell at least within the scope of Section 3500 (e) (2) (a "substantially verbatim recital" of an oral statement), and perhaps within the scope of Section 3500 (e) (1) as well.

There is likewise no question that proper demand was made by the defense for these statements. A general demand was made by the defense before the cross examinations for all of Sullivan's and Ondrejka's statements in the government's possession. A specific demand was made at the end of Ondrejka's testimony for those statements of Ondrejka which included a report of his expenditures.

It cannot be seriously claimed that these reports do not "relate to the subject matter as to which the witness has testified." In *Rosenberg* v. *United States*, 360 U. S. 367, this Court ruled that a statement useful for impeachment comes within the scope of the statute, even if it does not directly contradict or support the substance of the testi-

mony but simply impeached credibility. Assuming (which we do not) that the reports only set forth the moneys received by the witnesses, the pecuniary interest of a delator would always cast light upon his credibility (cf. *Fisher* v. *United States* (9 Cir., 1956), 231 F. 2d 99).

Given the clear producibility of the statements under the statute it would seem that the ruling of the trial court was plainly erroneous. Even had the record been ambiguous as to whether defense counsel was entitled to the statements the trial judge should have ordered their production before him. As Mr. Justice Frankfurter, concurring, pointed out in *Campbell* v. *United States*, 360 U. S. 85, 108, the trial judge should conduct an inquiry into producibility unless the statements are "patently not producible." The trial court's ruling was not rendered any the less erroneous by the fact that the prosecution had proffered in the place of the demonstrative evidence of the statements, themselves a schedule of dates of payment and amounts. The statute requires that the original statements be furnished to the defense, not the prosecution's bowdlerized version of those statements.

The Court of Appeals affirmed the trial court's ruling as within its discretion because, "it is not conceived" how the statements would enhance the record already made that the witnesses were paid government informants. But that is the main burden of our complaint. As this Court stated in *Gordon* v. *United States*, 344 U. S. 414, 420,

> "For production purposes it need only appear that the evidence is relevant, competent, and outside any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or if so it was harmless."

No one could "conceive" what use these documents would have been to the defense until they were produced and it was known what was in them. All that mortal men might do is speculate as to the use which might have been made of them. Petitioner could not rationally say what use he might have made of them since his trial counsel did not see them; the Court of Appeals could not rationally say that the failure to furnish these documents to defense counsel was harmless error, until they were at least made a part of the record by production before the trial judge. Even then such speculation would be dangerous. A jury trial has many intangibles. A document which an appellate court might regard as useless or cumulative may nonetheless be decisive in the hands of trial counsel with every fibre of his conscious and subconscious being tautly attuned to the nuances of the case.[3] As this Court pointed out in *Clancy* v. *United States*, 365 U. S. 312,

> "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively."

In *Palermo* v. *United States*, 360 U. S. 343, this Court ruled that Congress had substituted a stricter statutory procedure for the broader doctrine established in *Jencks* v. *United States*, 353 U. S. 657. We do not believe that Congress, having limited the rights of a defendant in a criminal trial, intended that the trial courts should have "discretion" to limit those rights even further. This is not a matter of trial convenience. This is a Congressional delimitation of the right of confrontation under the Sixth Amendment. Where such a fundamental right is involved, trial convenience must yield. In any event, the trial judge's discretion—if any there be under the statute—is a legal

3. See, Wellman: The Art of Cross Examination (4th Edition, the MacMillan Company, 1936).

discretion and must be exercised "understandingly". The trial judge here, without the documents before him could not exercise an understanding discretion.

POINT II. THE TRIAL COURT'S INSTRUCTIONS ERRONEOUSLY DEFINED THE STATUS OF BEING A MEMBER OF THE COMMUNIST PARTY. THE INSTRUCTIONS GIVEN DEPRIVED DEFENDANT OF DUE PROCESS OF LAW AND PERMITTED CONVICTION TO REST ON THE EXERCISE OF RIGHTS PROTECTED BY THE FIRST AMENDMENT.

MEMBERSHIP.

A. The Confusion of the Statuses of Membership and Affiliation.

Even had the trial court given a proper definition of membership to the jury, we submit that the validity of its instruction would have been vitiated by its erroneous confusion, in the instruction on affiliation, of the statuses of membership and affiliation. When the jury was erroneously told that membership and affiliation were equivalents and also that affiliation was an "alliance", and also that affiliation was a status "less than membership", the result could only be to confuse the jurors as to both statuses, leaving them free to return a verdict of guilty on the membership count on the basis of the invalid affiliation instruction which permitted the jury to rest a guilty verdict on its political prejudices.

The membership instruction itself also erroneously confused the two statuses. As we show below the instruction defined membership solely in terms of subjective intent. The Court then instructed the jury that evidence of "isolated" acts of cooperation or "isolated" expressions showing sympathy with the Communist Party were not "conclusive evidence of membership". This negatively phrased

instruction impelled upon the jury that non isolated acts of cooperation and expressions showing sympathy would be conclusive evidence of membership. But, as we discuss more fully in Point III, under the definition of affiliation given the jury whereby affiliation was also defined only as a subjective relationship, the same evidence would also constitute proof of affiliation. Thus on the operational level as well as the linguistic level the two statuses were confused.

B. The Failure to Define Membership Properly.

This court in *Douds* had a fully developed idea of what constituted membership in the Communist Party. Membership was a definite objective factual phenomenon. One became a member by a specific formal act of joining. ("* * * the act of joining is crucial." 339 U. S. at p. 411.) Once he had joined a member assumed the formal responsibilities of membership. In other words, membership in the Communist Party, once acquired, requires, like membership in other organizations, that the members conform to certain rules.[4] There were objective criteria for obtaining and retaining Communist Party membership.[5]

4. "Members are admitted only upon acceptance as reliable and after indoctrination in its policies to which the member is fully committed. They are provided with cards or credentials, usually issued under false names so that the identification can only be made by officers of the Party who hold the code. Moreover, each pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute 'cells' in the factory, the office, the political society, or the labor union." (339 U. S. at p. 432. Mr. Justice Jackson, concurring.)

5. From an abundance of judicial evidence it is clear that the Court's approach in *Douds* is in accordance with the facts. Thus in this case, it was the testimony of the prosecution witness Ondrejka, that as a member of the Communist Party he paid dues (tr. 503-504). In *United States ex rel. Ketunnen* v. *Reimer* (2 Cir., 1936), 79 F. 2d 315 Ketunnen testified that he joined by signing a

The definable objective nature of membership in the Communist Party appears to be a fundamental presupposition underlying the *Douds* ruling. It was on the basis of the congressional finding that the Communist Party was an objectively identifiable, tightly disciplined group that Congress could constitutionally distinguish between membership in the Communist Party and membership in other political organibations, and Communist Party membership might be singled out in the statute without reference to the personal beliefs or practices of the individual members. Had Party membership been considered a more amorphous or tenuous relationship, without objective criteria, this Court could not have upheld the forepart of the oath. Membership then would not necessarily have constituted a relationship where Party discipline was possible and an engagement in political strikes at Communist Party direction might be presumed. The statute would have permitted guilt by association.

The trial court departed from *Douds* and gave the jury a definition of membership couched solely in the subjective terms of a "desire" on the part of the individual to be a member, and a "recognition" by the Party that he is a member. (The Court then went on to instruct the jury how to determine "a state of mind"). Not only does this definition fail to meet the *Douds* requirement that the objective "act of joining" be shown;[6] it is also an inadequate

membership application and tendering dues, subject to acceptance of his application by the Party. In *Dennis* v. *United States*, 341 U. S. 494, the government produced ten undercover agents who had been members of the Communist Party. Party membership cards for eight were offered in evidence. In addition, annual registration cards and transfer cards were made part of the record.

6. This does not mean, of course, that there must be testimony of the actual joining. It does mean that in substance, the court must instruct the jury that it must be convinced from the evidence that the act of ajoining took place and that membership had not been abandoned.

definition of membership in subjective terms. A person may "desire" to be a member of the Communist Party and be "recognized" as such by the Party, yet still not "recognize" or consider that he is a member. Such a person could take the oath in good faith. Under the trial court's instructions such a man could have been found guilty by the jury.

The comments of the Court of Appeals in *Fisher* v. *United States* (9 Cir., 1956), 231 F. 2d 99, 107, are apropos here

> "Membership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization. Moreover, certain actions are usually required such as paying dues, attending meetings and doing some of the work of the group."
>
> "* * * Appellant contends that he might honestly state he was not a member if he had failed to comply with any of the Party's formal requirements for membership as stated in its Constitution. The government does not answer this contention in their brief. The jury should have been reminded of the components of the term membership rather than supplied with synonyms."[7]

The trial court, defining membership exclusively in terms of a state of mind, raised the same constitutional question which divided this Court evenly on the validity of the "belief" portion of the oath. Where the crime consists solely of a state of mind (particularly in the area of ideas and politics), proof of that state of mind must rest upon

7. Mr. Justice Burton, concurring in the decision in *Jencks* v. *United States, supra,* cited the *Fisher* decision with approval. The court below may have thought it was following Mr. Justice Burton's opinion in the first paragraph of its membership instruction. But we do not read Mr. Justice Burton's opinion as providing an exclusive definition of membership; it merely pointed up an error below. The unqualified reference to *Fisher* indicates that Mr. Justice Burton adopted the requirement of that case, that the formal requisites of membership be given the jury.

surmise and suspicion, not upon objective fact, and conviction or acquittal must turn upon the prevailing political climate and the orientation thereto of the triers of fact.

> • • • "I cannot deem it within the rightful authority of Congress to probe into opinions that involve only an argumentative demonstration of some coincidental parallelism of belief with some of the beliefs of those who direct the Communist Party though without any allegiance to it. To require oaths as to matters which open up such possibilities invades the inner life of men whose compassionate thought or doctrinaire hopes may be as far removed from any dangerous kinship with the Communist creed as were those of the founders of the present orthodox political parties in this country." (339 U. S. at p. 422; Mr. Justice Frankfurter commenting.)

The trial court's failure to remind the jury of the "components of the term membership" (*Fisher* v. *United States, supra*) was error which left the jury free to write its own definition of what objective circumstances constituted membership in the Communist Party and evidence thereof. If the jurors felt the defendant showed Communist leanings (with all the variations of significance attached to that epithet) they were free to substitute their own political prejudice for evidence of objective acts constituting membership.[8]

This is not mere inference. The instruction itself encouraged the jury to such logic. The jurors were specifically instructed that they might consider isolated acts of cooperation, and isolated expressions "showing" sympathy (not even "of" sympathy) as evidence of membership. The court further charged that "isolated" acts of cooperation with the Communist Party, and "isolated" statements showing sympathy with the Communist Party are not in themselves "conclusive evidence of membership". This

8. "Trifles light as air are to the jealous confirmations strong as proofs of holy writ." Shakespeare: *Othello*, Act III, Sc. 3, L. 323.

half-truth could only carry the inference to the jurors that non-isolated acts of what they considered to be cooperation, and non-isolated expressions which they considered to show sympathy would be conclusive evidence of membership. Having defined membership in the purely subjective terms of "desire" and "recognition," the trial court was compelled to permit the jury to rest its verdict, not upon evidence of membership but upon a subjective evaluation of "cooperation" and "sympathy." But "cooperation" and "sympathy" (no matter how full) are not membership and cannot add up to membership. They are less than membership (although they may constitute affiliation as defined by the trial court). The terms as they were given to the jury by the court are simply empty vessels, to be filled with the logic of parallelism. Under the instructions, the verdict could only have been based upon speculation, not evidence. (The trial court next brought the logic of its position to full circle, explicitly permitting the jurors to base their verdict upon the unconstitutional doctrine of parallelism by its instructions as to the "indicia" of membership.

C. The Erroneous Instruction as to the "Indicia" of Membership.

The trial court instructed the jurors as to certain statutory "indicia" which they might take into account in determining Communist Party membership.[9] The court's use of these statutory "indicia" was, in a very real sense, an abdication of its judicial function to instruct the jury on the law in terms of the facts of the case before it, "to bring into

9. The "indicia" are derived from Section 5 of the Communist Control Act of 1954 (50 U. S. C. Section 844) whose legislative history is discussed in Section IA of the Brief for Raymond Dennis, *et al.*, *amici curiae*. The Court is respectfully referred to this discussion which will not be duplicated here.

view the relations of the particular evidence adduced to the particular issues involved". *Bird* v. *United States*, 180 U. S. 356, 361. As might be expected, the court's use of such "canned" instructions aggravated previous error and created additional error.

Since the court defined membership as solely a subjective phenomenon, the objective "indicia" of membership which it gave the jury became, in a very practical sense, the status itself. As Judge Michael A. Musmanno, sponsor of Section 5 of the Communist Control Act, stated, membership is "spelled out" in terms of factual situations.[10] Congressman Dies, the patron of the bill in the House, said, "you define fifteen factual situations which constitute membership—* * *"[11] The oath required by Section 9(h) thus becomes, not an oath forswearing membership in the Communist Party but one forswearing each of the fifteen "indicia" of membership.

We do not believe that this Court in *Douds* intended to hold constitutional an oath that the affiant had not "indicated by word, action, conduct, writing or in any other way, a willingness to carry out in any manner and to any degree the plans, objectives or designs of the Communist Party" (Item 11 of the indicia). The oath as interpreted by the court below is just such an oath (with the near-meaningless qualification that the "word, action, writing, conduct or any other way" not be "isolated").

Union officers, by the nature of their calling, tend to be intellectually adventuresome men and women, confident of their ability to handle most situations. The nature of the problems which confront their membership may lead them into contact with radical left. Often the "plans, objec-

10. Hearings before Subcommittee No. 1 of the Committee on the Judiciary of the House of Representatives (83d Cong. 2nd Sess.)—Serial No. 14 "Internal Security Legislation," page 131.

11. 100 Cong. Rec. 14652.

tives or designs" of the Communist Party coincide with those of the labor movement or some portion of it. It is one thing to require these men to forswear present membership in the Communist Party. It is another thing to require them to regulate their "words, actions, writings, conduct", etc. in terms of whether or not at some subsequent time a jury will find them to have "indicated • • • a willingness to carry out" in some manner (unspecified) and to some degree (unspecified), the "plans, objectives or designs" (without specification as to their nature or quality) of the Communist Party. The oath no longer affects only a "handful of persons". It reaches the entire labor movement by limiting the freedom of its leadership. We do not believe that the labor movement can be compelled to cut its cloth to fit any political pattern be it Communism or anti-Communism.

Congress, in enacting the statute, dropped from Section 9(h) a provision depriving unions of access to Labor Board procedures if their officers "by reason of active and consistent promotion or support of the policies and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party • • •[12] The

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12. Section 9(h) of H. R. 6020 as reported by the House Labor Committee would have denied access to Board procedures to any union whose officers included a person who

> "is or ever has been a member of the Communist Party or by reason of active and consistent promotion or support of the policies and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such Party."

A similar provision was inserted by amendment of the Senate bill, S. 1126. The Conference Committee altered both House and Senate bills, recommending Section 9(h) as it was enacted. Senator Tydings discussing this terminology said:

> "When we get down to the determination of what someone says, as to whether a man is promoting the policies of the Communist Party, we often run into a twilight zone and the examination might turn into a witch hunt." 93 Cong. Rec. 5083, 2 Legislative History 1412.

instructions below not only judicially reinstate in the statute this provision which the legislature rejected but go much farther. The "twilight zone" which the late Senator Tydings foresaw has taken over the statute. The proposal which Congress rejected at least required that the officers "reasonably" be considered members. The Musmanno bill which the trial court incorporated in its instruction did not even pay superficial deference to the rule of reason. The indicia are rife with criteria of guilt not reasonably related to membership in the Communist Party.

Careful analysis of the instructions indicates that a person might come within each of the eleven "indicia" given the jury (with the possible exception of item 4) and still not have acquired the status of membership. Thus, a person could make a contribution to the Communist Party earmarked for some worthy part of its program (item 1), without membership. The court itself recognized that attendance at Communist meetings (item 2) was not necessary proof of membership (tr. 708). See also *Bridges* v. *United States* (9 Cir., 1952), 199 F. 2d 811, 836.

The statutory indicia as given to the jury permitted the jurors to consider the most remote and insubstantial evidence (or testimony of no evidentiary value) as evidence of guilt. There is no limitation as to time in any of the indicia. No matter how temporally and logically remote the proof of the "indicia" was, the jury was instructed that it might take it into consideration as evidence of membership. Moreover, each of the indicia has an open end which prohibits its limitation to any reasonable bounds (even assuming validity of the theory of parallelism upon which the instructions are based). Each of the "indicia" (except the seventh) uses phrases such as "any," "and other type,"

"of any kind," "in any manner," "to any degree," "in any way" or "in any other way." Nowhere was the jury instructed how it should consider the degree and quality of the indicia as shown in the evidence. The failure to limit the evidentiary use of the "indicia" to their evidentiary value (if any) left the jury free to incorporate its own prejudice into the "indicia."

Should the jurors have had any doubt that parallelism was the essence of the definition of membership given them by the court, item 11 of the "indicia" would have removed it. By the terms of that paragraph it is evidence of membership that the defendant had indicated "in *any* • • • way a willingness to carry out in *any* manner and to *any* degree the plans, objectives or designs of the Communist Party." (Emphasis supplied.) As the Wall Street Journal put it, apparently referring to this clause,

> "One of these provisions is that it would be evidence of cooperation with Communist groups if any person has indicated a willingness to carry out the aims and purposes of the party. For all we know the Communist Party may be against juvenile delinquency. So is this newspaper."

The jury was not even instructed that the defendant had to know of the parallelism. It was sufficient if defendant's acts were done "voluntarily and purposefully" as opposed to "because of a mistake or inadvertance" (tr. 674).

The theory of parallelism is not a new one. It is essential to every heretic hunt where the subjective mental processes of a man, and not the quality of his acts are in question. All faiths now recognize the excesses of the Inquisition. Certainly the drafters of the Bill of Rights thought they were forbidding a repetition of those excesses. The instructions permitting use of the "indicia" as evidence of

guilt are a revival of the long dead practices of the Inquisition and should not be upheld by this Court.[13]

13. Lea: *The Inquisition of the Middle Ages* (Citadel Press, First Paperbound Edition, 1961) describes the use of the logic of "parallelism" by the Inquisition

> "From almost the inception of the Holy office there was an effort to lay down rules as to what constituted evidence of heresay; but the Council of Narbonne, in 1244, winds up an enumeration of the various indications by saying that it is sufficient if the accused can be shown to have manifested by any word or sign [cf. 'in any way'] that he had faith or belief in heretics or considered them to be 'good men' (bos homes). (p. 127)
>
> • • • • •
>
> "Naturally the conscientious inquisitor recognized the vicious circle in which he moved and sought to satisfy himself that he could designate infallible signs which would justify the conclusion of heresy. There is ample store of such enumerated. Thus for the Cathari it sufficed to show that the accused had venerated one of the perfected, had asked a blessing, had eaten of the blessed bread or had kept it, had been voluntarily present at an heretication, had entered into the *convenansa* to be hereticated on the deathbed, etc. For the Waldenses such indications were considered to be the confessing of sins to and accepting penance from those known not to be regularly ordained by an orthodox bishop, praying with them according to their rites by bending the knees with them when they pretended to make the Host, receiving 'peace' from them, or blessed bread. All this was easily catalogued, but beyond it lay a region of doubt concerning which authorities differed. The Council of Albi, in 1254, declared that entering a house, in which a heretic was known to be, converted simple suspicion into vehement; and Bernard Gui mentions that some inquisitors held that visiting heretics, giving them alms, guiding them in their journeys, and the like was sufficient for condemnation, but he agrees with Gui Foucoix in not so considering it, as all this might be done through carnal affection or for hire. The heart of man, he adds, is deep and inscrutable, but he seeks to satisfy himself for attempting the impossible by arguing that all which cannot be explained favorably must be admitted as adverse proof. It is a noteworthy fact that in long series of interrogations there will frequently be not a single question as to the belief of the party making confession. The whole energy of the inquisitor was directed to obtaining statements of external acts. The upshot of it all necessarily was that almost everything was left to the discretion of the inquisitor, whose temper had more to do with the result than the proof of guilt or its absence. . . . Under such a system the most devout Catholic could never feel safe a moment." (pp. 128-129).

POINT III. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY CONCERNING THE STATUS OF BEING "AFFILIATED WITH" THE COMMUNIST PARTY. THE INSTRUCTIONS GIVEN DEPRIVED DEFENDANT OF DUE PROCESS OF LAW AND PERMITTED CONVICTION TO REST ON THE EXERCISE OF RIGHTS PROTECTED BY THE FIRST AMENDMENT.

A. To Be "Affiliated With" the Communist Party Within the Meaning of Section 9(h) Is to Be a Member of an Organization Affiliated With the Communist Party. Any Other Interpretation of the Statute Violates the First and Fifth Amendments.

Webster's New International Dictionary defines "affiliate" as follows:

> "To connect or associate oneself with; to adopt, hence usually to bring or receive into close connection; to ally."

The text of Section 9(h) makes clear that Congress intended the phrase "affiliated with" as it appears in the statute not to have as broad a meaning as the dictionary definition permits.

The oath prescribed by Section 9(h) reaches five separate statuses, being a "member" of the Communist Party, being "affiliated" with such party, "belief" in the overthrow of the United States Government by force or any illegal or unconstitutional method, being a "member" of an organization that believes in or teaches such overthrow, and "support" of such an organization. The itemization of the separate concepts, as well as the use of the disjunctive "or" between the membership and affiliation sections show that Congress regarded membership and affiliation as different statuses, a not uncommon congressional usage. (A similar differentiation of the two statuses is made by

the Immigration and Nationality Act,[14] which penalizes "whoever becomes or is a member of, *or* affiliated with any such society etc." (emphasis supplied) and the Smith Act.[15] As far as counsel can determine, every tribunal except the trial court below which has discussed the term "affiliated" has likewise differentiated it from a membership status.

In *American Communications Association* v. *Douds*, 339 U. S. 382, this Court seems to have taken the view that one is "affiliated with" the Communist Party by being a member of an organization which is affiliated (*i.e.*, organizationally linked) to that Party. Thus Chief Justice Vinson spoke of the Act as applying to "members of the Communist Party and affiliated organizations" (p. 406). Mr. Justice Frankfurter, who found the forepart of the oath to be constitutional spoke of it as a disavowal of "actual membership in the Communist Party, or in an organization which is in fact a controlled cover for that party" (p. 421). Mr. Justice Black spoke of the oath as reaching members of the Communist Party or its "affiliates" (p. 450).

This view of one meaning of the term "affiliated with" flows logically from the Court's view of the statute in *Douds*. The purpose of the statute is the prevention of political strikes. The "belief" and "support" provisions of the oath, so the Court held, reach those persons whose state of mind might cause them to lead political strikes. The membership provision deals with ascertainable, objective fact from which, this Court held, Congress might legitimately infer a likelihood of engaging in political strikes. If the correlative term "affiliated with" the Communist Party be given the like meaning of knowing membership in an organization affiliated to the Communist Party, then the Congressional scheme as defined by this Court is pre-

14. 8 U. S. C. Section 1182(a)(28)(A), Section 1101(e)(1).

15. 18 U. S. C. Section 2385.

served since "affiliated with" would likewise deal with an ascertainable objective fact.

Such an interpretation would conform with the traditional use of the term in the labor and radical movements—and the oath was to be taken by trade unionists—whereby "affiliation" refers to a relationship between organizations. (Section 9 (h) itself uses the term in a similar fashion when it speaks of "such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit.") The Communist Party, as well as the Socialist Party from which it came, seem, at one time or another to have followed this organizational form, having both direct membership and indirect membership through affiliated organizations.[16]

This Court has long followed the policy of choosing that interpretation of a statute which will avoid constitutional questions over an interpretation that will raise them, *Communist Party* v. *Catherwood*, ... U. S. ..... (not yet officially reported), a policy which will be served here by following the definition of the term which, we believe, was laid down by this Court in *Douds*. Any definition of "affiliated with" which is broader than the one we suggest must approach the meaning of the term when used in the immigration statutes as defined by this Court in *Bridges* v. *Wixon*, *supra*.[17] But as Mr. Justice Jackson pointed out, whatever the validity of such a statute as applied to an alien in an immigration situation, "there is no analogy between what Congress may require of an alien as a condi-

16. See, Foster: History of the Communist Party, pp. 114, 117, 181, 190. Draper: Roots of American Communism, pp. 66, 225, 273.

17. The *Bridges* case defines "affiliated with" in terms of a subjective relationship with the Communist Party (other than membership) to achieve its proscribed objective.

tion of admission or citizenship and what it may require of a citizen." 339 U. S. at p. 436. To apply the *Bridges* definition of "affiliated" to Section 9(h) in combination with 18 U. S. C., section 1001 opens a Pandora's box of constitutional questions.

The first of these constitutional problems, is that affiliation in *Bridges* is defined only in terms of the mental attitude of the individual involved, with no objective criteria of guilt, cf. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. The jury is thereby compelled to base its finding of guilt or innocence upon its own ideas or prejudices concerning what facts constituted affiliation. (Since we have discussed the consequences of such a definition in Point II we will not enlarge upon that argument here.)

When measured against the requirement of due process that terms of criminal statute be definite and certain in their meaning (cf. *Connolly* v. *General Construction Co.*, 269 U. S. 385, *United States* v. *Cohen Grocery Co.*, 255 U. S. 81), the meaning of "affiliated" in the immigration and nationality statutes is plainly inadequate. In *United States ex rel. Ketunnen* v. *Reimer*, (2 Cir., 1936), 79 F. 2d 315, the court did not even attempt to give a comprehensive definition of the word "affiliated" as used in the statute. The court thought "very likely that is as impossible as it is now unnecessary." In *Douds*, Mr. Justice Frankfurter cited *Bridges* v. *Wixon* as illustrating "the dubious scope of the term 'affiliated'" (339 U. S. at p. 420). In the *Bridges* case itself the various administrative officers and courts were unable to agree upon the meaning of the term in the immigration statute (cf. 49 F. Supp. 292, 307; 114 Fed. 927, 938, 941; 326 U. S. 135, 142 ff.). In *Inland Steel* v. *National Labor Relations Board* (7 Cir., 1949), 170 F. 2d 247, 262, aff'd, 339 U. S. 382, Judge Major (in dissent), referring to the word affiliated stated, "The [Supreme] Court's decision [in *Bridges*] is convincing that its mean-

ing would be quite beyond the reach of the ordinary citizen."

The correctness of Judge Major's prophecy is demonstrated by the experience of the courts themselves in administering Section 9(h). The various trial and appellate judges have been unable to agree among themselves as to the definition of the term "affiliated with." In the two trials of this very case the same trial judge gave different instructions concerning "affiliation." In the first trial the trial judge defined it as "less than membership." At the second, the trial judge defined it as the "equivalent" of membership. (The Court of Appeals approved both instructions!) In *Hupman* v. *United States* (6 Cir., 1955), 223 F. 2d 598, the trial court merely instructed the jury to follow the dictionary definition of affiliation and that it meant "something less than membership but more than sympathy." A similar instruction was given by the trial court in *Jencks* v. *United States, supra.* On certiorari three members of this Court disagreed as to the propriety of that instruction (JJ. Burton and Harlan finding the instruction inadequate under *Bridges,* Mr. Justice Clark finding it adequate). In *Fisher* v. *United States, supra,* the trial court's instruction giving the jury the dictionary definition of "affiliated" was held insufficient because it failed to advise the jury that "affiliation" comprehended a continuing reciprocal relationship involving duties and responsibilities. In *Bryson* v. *United States* (9 Cir., 1956), 238 F. 2d 657, the Court of Appeals disapproved the trial judge's failure to instruct the jury that proof of affiliation included proof of adherence to the objectives of the Communist Party as distinguished from mere cooperation with its lawful activities.

Surely when the trial and appellate courts are in such manifold disagreement, no layman using *Bridges* v. *Wixon* as his guide could be reasonably expected to interpret

intelligently the required oath as to affiliation, and he could not be constitutionally tried for a false statement in connection therewith. (Bridges, himself, could not have known in advance of this Court's decision in *Bridges* v. *Wixon*, whether or not he would be held to be "affiliated with" the Communist Party.)

Still another constitutional question would be raised under the First Amendment by the use of the indefinite *Bridges* v. *Wixon* definition of "affiliated." In *Douds* this Court upheld the oath as to membership in the Communist Party because, it held, Congress could constitutionally infer that membership in the Communist Party was indicative of a potential engagement in political strikes. This Court emphasized in its opinions, the limited nature on the impingement upon the First Amendment freedoms of unions and their officers (339 U. S. at pp. 397, 404, 409). "Affiliation" under the *Bridges* definition is a much broader concept than membership. Membership in the Communist Party may signify acceptance of the Communist Party's alleged use of the political strike. "Affiliation" need not. A person may "enter into an alliance" with the Communist Party for the achievement of its "purposes or objectives" of a socialistic state yet still neither accept its discipline nor endorse its methods. Congress could not rationally assume such a person to be more likely than any other to engage in a political strike. Indeed the contrary is more likely the case. Rejection of Communist Party discipline by not undertaking membership although accepting the Party's objectives indicates a man who has already rejected the Party's putative methods—including the political strike. Thus if the *Bridges* v. *Wixon* definition of "affiliated" be likewise that of Section 9(h), the constitutional rationale for the upholding of Section 9(h) fails. Section 9(h) would in truth provide "guilt by association." Congress would have penalized a man and his union—not

because of his own actions or beliefs—but solely because of his associations with others in activities protected by the First Amendment. It is well established that the First Amendment protects the rights of citizens to associate with others for political purposes. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *DeJonge* v. *Oregon*, 299 U. S. 353; *Cruikshank* v. *United States*, 92 U. S. 542. Congress cannot constitutionally make that association criminal.

The *in terrorem* effect of such a statute would produce an even more pervasive restriction of First Amendment rights. As we have shown above, the *Bridges* v. *Wixon* definition of "affiliated" is vague and indefinite. Proof of "affiliation" is fundamentally proof of a man's political attitudes. A jury would therefore be left free, in finding guilt or innocence to flesh out the skeletal definition of "affiliated" with its own political prejudices.

In the present day world "Communism" has become a political epithet. In certain Southern areas, proof of integrationist activities would be regarded as proof of Communist "affiliation." In other areas, even discussion advocacy of the advisability of recognition of Red China is Communist. To some people, a resolute adherence to fair play and civil rights is affirmative evidence that a person is "soft on Communism," to some the fact that a man is a union member or officer is evidence of Communism. We do not fully understand the John Birch Society's definition of a "comsimp." We are sure that those who do understand it could not distinguish between such a person and one "affiliated with" the Communist Party as defined in *Bridges*. The net effect therefore, of the transposition of *Bridges* v. *Wixon* to Section 9(h) would be to encourage a union officer to take or refrain from taking political positions, not because he thought they were wrong, but because they were unpopular. A statute so broad as to restrict First Amendment rights in such a manner is unconstitu-

tional even if its ambit also includes activities which may properly be condemned, *Winters* v. *New York*, 333 U. S. 507; *Herndon* v. *Lowry*, 301 U. S. 242.

Not only must a union officer forfend all "dangerous thoughts," he must police his associations as well. If he finds himself upon a strike committee or in a political meeting with a Communist, safety requires he withdraw. Moreover, Communists notoriously conceal their identity. He must shun therefore, not only contact with avowed Communists; he must screen all his contacts for their political opinions. Otherwise he cannot tell when his own innocent associations may be used against him as evidence of illegal "affiliation."

We do not contend that with the passage of Section 9(h) the officers of the American labor movement become political eunuchs. We do contend that they are men like any others, some timid, some brave, some wise, some foolish, with all the variations in between and that the inevitable effect of incorporating the *Bridges* definition of "affiliated" into Section 9(h) is to make the less brave and wise restrict their associations and activities protected by the First Amendment. The First Amendment does not require that men be brave or wise to maintain their rights.

It is no answer to say that the statute only punishes a "knowing" misstatement as to affiliation, and that the *in terrorem* effect of the statute is lessened thereby. Within a wide range the *Bridges* v. *Wixon* definition of "affiliated" must leave the application of that term to the jury. Guilty knowledge under the *Bridges* definition is to be derived by the jury from a man's knowledge of facts which the jury (in all its prejudices) thinks constitute affiliation. A defendant's contention that he had a different definition of the term in mind would be given short shrift indeed. No sensible man viewing the *Bridges* litigation, or the

two trials and two appeals of this very case, would risk the fortune of money, time and energy—not to speak of the personal anxieties and fear for loved ones—involved in a possible vindication by the courts, upon the hazard that a jury would find that if he was "affiliated with" the Communist Party in the *Bridges* sense of the term, he was not "knowingly" so affiliated. cf. *Musser* v. *Utah*, 333 U. S. 95.

Moreover, the very fact of indictment would limit First Amendment rights. Section 9(h) provided for annual oaths. Having been indicted for one oath, a man should be most reluctant to retain union office where he would be required to take another oath while the previous indictment was pending. Thus even if finally held innocent, a union officer might be penalized by reason of the unconstitutional broadness of the oath.

B. Assuming That Bridges v. Wixon Does Provide a Proper and Constitutional Base for the Instructions to the Jury Concerning the Meaning of "Affiliated With" in the Oath, the Instruction Given by Trial Court Did Not Meet the Requirements of That Precedent. The Instruction It Gave Was Contradictory; It Provided Only the Appearance of Guidance for the Jury Without the Substance; and It Permitted Conviction on the Basis of Activities Protected by the First Amendment.

The constitutional foundation for the validity of the oath lies in the actual or potential connection of the statuses forsworn to the political strike. The keystone of the *Bridges* ruling is that the "affiliation" must encompass the evil at which the statute is aimed, the organization's "unlawful objectives" (326 U. S. at p. 146, see also 326 U. S. at pp. 143, 144). Under Section 9(h) the proscribed objec-

tive of the Communist Party is the use of the political strike. The trial judge should have charged the jury that the "affiliation" charged in the indictment was acceptance of the Communist use of the political strike.

The trial judge's refusal so to charge (although requested, tr. 610) left the jury free to apply the statute unconstitutionally. Even if the jury found that what it felt to be the defendant's "affiliation" did not encompass endorsement, or acceptance of political strikes it could return a verdict of "guilty." An instruction which permits such a verdict is improper. *Stromberg* v. *California*, 283 U. S. 359; *Bryson* v. *United States, supra.*

In the instant case the deficiency of the instruction was highlighted by the instruction given. The jury was instructed that "affiliated" meant a "relationship short of and less than membership in the Communist Party • • • but more than mere sympathy with its aims." This could only create confusion in the minds of a jury. How much more than sympathy? How much short of membership? The range of attitudes comprehensible between the extremes of these two concepts is almost limitless. Absent an instruction to the jury directing its deliberations to the evil at which the statute is aimed, those deliberations could only have been couched in terms of whether or not it considered the defendant to be communistically inclined. The vagueness of instruction permitted the jury to substitute political epithets for fact finding.

Nor did the second paragraph of the instruction sufficiently narrow the overly broad definition of the first paragraph (the second paragraph is apparently based on *U. S.* v. *Ketunnen Reimer, supra,* where the court itself confessed its inability to fully define the term "affiliated with"). What constitutes an "alliance"? Again without a pinpointing of the prohibited state of mind the jury

is reduced to political epithets for a basis for its verdict.[18] Moreover, the first two paragraphs are contradictory. The second paragraph delimits a relationship conceptually nearer that of membership than of sympathy. (The distance in constitutional significance between "alliance" and "membership" is a vast one. What is constitutionally important under the First Amendment is the difference not the similarity.) The jury in trying to reconcile the first two paragraphs of the instruction may well have broadened the scope of the second paragraph, rather than narrowed the scope of the first paragraph.

In its third paragraph the instruction compounds confusion by equating membership and affiliation "in all but name."[19] In the first place, this is incorrect. This Court ruled in *Bridges* that affiliation is "not equivalent to membership duty" (326 U. S. at p. 142), and as we have shown above the act itself treats the statutes as distinct and separate. In the second place, the instruction is rendered completely contradictory. The jury was told in one breath that "affiliated" means a relationship of less than membership, and in the next breath that it was equal to membership. Contradictory instructions are no instructions. In the third place, the instruction incorporates into the definition of "affiliated with," all the defects of the definition of membership which we have discussed in Point II.

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18. In *Bridges*, Judge Sears followed a similar definition. He found Bridges to be affiliated with the Communist Party because he opposed "red baiting" in the union. If any adherent of *ad hominem* logic were on the jury, the trial judge's instructions left him completely free to make a finding similar to that of Judge Sears.

19. The Court refused to give the defendant's requested instruction that the defendant could not be convicted on both the membership and affiliation counts (tr. 605). Thus the Court in giving both counts to the jury emphasized to it the error in the instruction that membership and affiliation were to be equated.

CONCLUSION.

On the foregoing arguments and the decisions cited, the judgment in this case should be reversed and a new trial directed.

Respectfully submitted,

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August 21, 1961.

APPENDIX.

STATUTES INVOLVED.

18 U. S. C., Sec. 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

18 U. S. C., Sec. 3500:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter

of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statements to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

1. a written statement made by said witness and signed or otherwise adopted or approved by him; or

2. a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

29 U. S. C., Sec. 159(h):

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits. July 5, 1935, c. 372, Sec. 9, 49 Stat. 453; June 23, 1947, 3:17 p. m., E. D. T., 120, Title I, Sec. 101, 61 Stat. 143; Oct. 22, 1951, c. 534, Sec. 1 (c. d), 65 Stat. 601.

THE INSTRUCTIONS TO THE JURY.

The instruction on membership:

"Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

"Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the time alleged in the indictment you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

"In determining whether or not the defendant was a member of the Communist Party at the time alleged in the indictment you may take into consideration whether the defendant:

1. Paid dues or made any financial contributions to the Communist Party or collected any funds on its behalf;

2. Attended Communist Party meetings, classes, conferences, or any other type of Communist Party gathering;

3. Had made himself subject to the discipline of the Communist Party in any form whatsoever;

4. Participated in any recruiting activities on behalf of the Communist Party;

5. Has executed orders, plans or directives of any kind of the Communist Party;

6. Has acted as an agent, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party;

7. Has been accepted to his knowledge as an officer or member of the Communist Party, or as one to be called upon for services by other officers or members of the Communist Party;

8. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the Communist Party;

9. Has spoken or in any other way communicated orders, directives, or plans of the Communist Party;

10. Has advised, counseled, or in any other way imparted information, suggestions, or recommendations, to officers or members of the Communist Party, or to anyone else, in behalf of the Communist Party;

11. Has indicated by word, action, conduct, writing, or in any other way, a willingness to carry out in any manner and to any degree the plans, objectives or designs of the Communist Party;

12. Has in any other way participated in the activities, planning or actions of the Communist Party.

"These are some of the indicia of Communist Party membership, but you are not limited solely to those I have enumerated. As sole arbiters of the facts, it is your duty to consider all the evidence, either direct or circumstantial, which bears upon the question of whether or not the defendant was a member of the Communist Party on the date alleged in the indictment." (Tr. 704-707.)

The Instruction on affiliation:

"The verb 'affiliated', as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

"Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.

"Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.

"In determining the issue as to whether the defendant was or was not affiliated with the Communist Party at the time alleged in the indictment, you may take into consideration any statements made or acts done by the accused, and all other facts and circumstances in evidence which may aid determination of the issue." (Tr. 679-680).